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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1016
73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN, and on behalf of all others similarly situated; and

ANNA STUCK, Intervenor,

Appellees.

(Continued on inside front cover)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE STUCK

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLEE STUCK

QUESTION PRESENTED

Whether a caretaker can be required as a condition of eligibility for Aid to Dependent Children to prosecute

or cooperate in the prosecution of a deserting or abandoning parent for paternity and/or non-support.

STATEMENT OF THE CASE

A. HISTORY

This action was brought originally as an attack on New York Social Services Regulation 369.2 (f)(3)(ii)(e)[1] which required that mothers of needy and dependent children institute and prosecute actions of non-support against deserting fathers. The three-judge court held that this regulation was invalid as creating an additional requirement for Aid to Dependent Children eligibility not provided for in the Social Security Act 42 U.S.C. 601, *et. seq.* The Court's decision was based on a regulation issued by the Secretary of the Department of Health, Education and Welfare which stated that the federal NOLEO requirement was to have "no effect upon the determination of eligibility"[2] as well as this Court's affirmances of three NOLEO cases.[3]

[1] The full text of the regulation appears at Appendix p. 24.

[2] 45 C.F.R. §235.70. NOLEO is the acronym for Notice of Law Enforcement Officials, the procedure required of welfare officials re deserting and abandoning parents of AFDC recipients under 42 U.S.C. §602(a)(11).

[3] *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill. 1971) aff'd. *sub nom. Weaver v. Doe*, 404 U.S. 987 (1971); *Meyers v. Juras*, 327 F. Supp. 759 (D.Ore. 1971) aff'd. 404 U.S. 803 (1971) reh. den. 404 U.S. 961; and *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Calif. 1971), aff'd. *sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971).

During the pendancy of the litigation on 369.2 (f)(3)(ii)(e), the New York State Legislature passed a new statutory NOLEO requirement (L. 1972 C. 687) codified in part as New York Social Services Law §101-a (2) & (3). Since the new NOLEO statute was not to take effect until September 1, 1972, the three-judge court did not treat its validity in its decision of June 7, 1972.

On appeal of the decision of the three-judge court by the New York State Department of Social Services, this Court vacated the judgment below and remanded the case to the three-judge court "for further consideration in light of Chapter 687 of the 1972 Laws of New York."

At the time of the remand the original named plaintiffs were no longer being proceeded against. Nor was regulation 369.2 (f)(3)(ii)(e) being enforced against the class. New York Social Services Law §101-a had replaced it. Since the policy being enforced was the same NOLEO condition of eligibility the three-judge court allowed the intervention of Anna Stuck and the amendment of the complaint to reflect the treatment she had received under 101-a. During the pendancy of the second round of litigation a new regulation was issued by the United States Department of Health, Education and Welfare purporting to allow the use of a NOLEO condition of eligibility against a caretaker, but not a child, recipient of ADC.[4] The three-judge court held September 26, 1974 that the HEW regulation was not a guidepost to be followed judicially and granted summary judgment to Anna Stuck declaring that 101-a was "void, unenforcible and without effect insofar as it makes recipient cooperation in a paternity or support

[4]Codified as 45 C.F.R. §233.90(b)(4)(i)(ii).

action against an absent parent a condition of eligibility for AFDC." Plaintiff's request for retroactive assistance for the period of her denial was refused. The opinion is reported at 365 F. Supp. 818 (1973). The decision was appealed by both defendants.

B. FACTS

The facts concerning the original named plaintiffs are as follows:

Sylvia Shirley, the mother of two infant daughters, did not wish to file a petition for non-support for fear it would ruin any possibility of reconciliation with her husband. In fact, her husband had informed her that if she took such a step he would file for divorce. Nonetheless the Onondaga County Department of Social Services refused her and her children welfare until she filed the non-support petition under 369.2 (f)(3)(ii)(e). Because of her brutal need for subsistence she complied on March 8, 1972. She attempted to withdraw the petition subsequently. Nonetheless in mid-April 1972 she was informed that her husband had filed for divorce. The divorce was granted by a Virginia Court later in the same year.

Elizabeth Anderson is the mother of an infant daughter. When her financial circumstances forced her to apply for welfare on January 15, 1972 she was told that she would have to file a petition of non-support against her husband. The filing of the petition was required as a condition of eligibility under 369.2 (f)(3)(ii)(e) notwithstanding the fact, which Mrs. Anderson made plain to the intake worker, that her

husband was a student whose sole source of income was a fellowship, and that he was providing regular support in the amount of $100.00 per month. She complied with the requirement since she needed the assistance to keep her daughter and herself alive. She moved to withdraw the petition subsequently but upon doing so she was informed that an order had been entered against her husband by Family Court in Long Island under the Uniform Reciprocal Support Act. Following the entry of this order her husband's support payments became sporadic.

Jane Doe and two of her children had received ADC since September, 1971. Her youngest daughter, Kirsten, became part of the assistance unit in October, 1971. On or about February 1, 1972, Mrs. Doe was informed that Kristen would receive no more assistance until Mrs. Doe took Kristen's father to Family Court and a support order was established. Mrs. Doe had instituted support proceedings against Kirsten's father in the fall of 1971. The matter had been placed on the "held" calendar at that time. Nonetheless Kirsten was terminated by the Onondaga County Department of Social Services for her mother's refusual to begin an entirely new proceeding notwithstanding the fact that the prior proceeding was still pending and that it had not resulted in the securing of full support payments. Kirsten received no welfare payments from March 1, 1972 until April 10, 1972 when counsel for the defendant Lascaris stipulated in open court to return Kirsten's grant since the Department had failed to comply with its own fair hearing procedure.

Anna Stuck intervened in the action after this Court's remand. She and her four infant children had

been receiving ADC since 1970. In February 1973 she was told by the Onondaga County Department of Social Services that her grant would not be continued unless she brought a paternity action against the father of her youngest daughter, Susan, or signed a statement authorizing the Department of Social Services to bring an action on her behalf. She would also be required to cooperate fully with the Department in such an action under pain of losing her assistance.

Anna Stuck did inform the Department of the name of Susan's father and the name of the small rural Western New York town in which he lived. She stated that she did not wish to file a paternity action against him and that she desired the agency not to do so. She felt that going through such a procedure would be fruitless, since Susan's father could not work due to a disability. She desired not to make a public issue out of the matter since such a proceeding would endanger her relationship with the father of her three older children. She had been required by the Department of Social Services to prosecute a paternity suit against this man when she first received welfare and she wanted to avoid the dissension and rancor which arises between parents when mother is forced to sue father. Her termination by the Onondaga County Department of Social Services was affirmed in a Fair Hearing decision dated March 7, 1973. The decision held that her declaration that she would not initiate paternity proceedings and that she desired that the agency not do so, coupled with her failure to give the Department the exact mailing address of Susan's father, constituted a lack of cooperation under Social Services Law §101-a sufficient to

terminate her public assistance.[5] She received no assistance for herself from March 7, 1973 until September 26, 1973.

ARGUMENT

I.

UNDER THE TOWNSEND DOCTRINE NEW YORK SOCIAL SERVICES LAW SECTION 101-a IS VOID FOR SETTING A CONDITION OF ELIGIBILITY FOR ADC NOT PROVIDED FOR BY THE SOCIAL SECURITY ACT.

New York Services Law §101-a requires applicants and recipients of public assistance to cooperate in the naming, locating and prosecuting of the non-supporting parents of ADC children. The States' power to establish conditions of eligibility was defined by this Court in *Townsend v. Swank:*

> [I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. *Townsend v. Swank*, 404 U.S. 282, 286, 92 S.Ct. 502, 505 (1971).

The Court has held on three different occasions that the NOLEO section of the Social Security Act does not

[5] Appendix at 117.

authorize conditions of eligibility.[6] The legislative history of these sections is devoid of discussion of conditions of eligibility.[7] By its affirmances in *Meyers*, *Taylor* and *Weaver*, the Court set the direction that has been followed by nineteen other federal courts.[8] It is

[6] *Meyers v. Juras*, 404 U.S. 303, 92 S.Ct. 91 (1971), pet. for rehearing denied 404 U.S. 803, 92 S.Ct. 91 (1971); *Carleson v. Taylor*, 404 U.S. 980, 92 S.Ct. 446 (1971); *Weaver v. Doe*, 404 U.S. 987, 92 S.Ct. 537 (1971).

[7] See the following two sections of this brief for a discussion of the legislative history.

[8] *Meyers v. Juras*, 327 F. Supp. 759, (D.Ore. 1971), aff'd 404 U.S. 303, 92 S.Ct. 91 (1971), Pet. for rehearing denied 404 U.S. 803, 92 S.Ct. 446 (1971); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Calif. 1971), aff'd *sub nom. Carleson v. Taylor*, 404 U.S. 980, 92 S.Ct. 446 (1971); *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill. 1971), aff'd *sub nom. Weaver v. Doe*, 404 U.S. 987, 92 S.Ct. 537 (1971); *Doe v. Shapiro*, 302 F. Supp. 761 (D.Conn. 1969), appeal dism'd 396 U.S. 488 (1970); *Doe v. Harder*, contempt, 310 F. Supp. 302 (D. Conn. 1970); *Woods v. Miller*, 318 F. Supp. 510 (W.D. Pa. 1970); *Doe v. Schmidt*, 330 F. Supp. 159 (E.D. Wisc. 1971); *Galindo v. Vowell*, (consent j'ment) Civ. 5A-71-CA-248 (W.D. Tex. 1971); *Doe v. Wohlgemuth*, (T.R.O.) Civ. Act. No. 1958 (W.D. Pa. 1971); *Saiz v. Goodwin*, 325 F. Supp. 23 (D. New Mex. 1971), rem'd. 450 F.2d 788 (10th Cir. 1971), 340 F. Supp. 165 (D. New Mex., 1971); *Saddler v. Winstead*, 332 F. Supp. 130 (N.D. Miss. 1971); *Chee v. Graham*, Civ. 70-532 Phx. WEC (D. Ariz. 1971); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Lewis v. Lavine*, ____ F. Supp. ____ (S.D. N.Y. 1972); *Doe v. Ellis*, 350 F. Supp. 375 (D. S.C. 1972); *Story v. Roberts*, 352 F. Supp. 473 (D.C. Fla. 1972); *Doe v. Rampton*, ____ F. Supp. ____ (D.C. Utah 1973); *Doe v. Burns sub nom. Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973); cert. filed Sept. 4, 1973; *Messer v. Flowers*, Preliminary inj. Civ. No. 74-117-CH (S.D. W.Va. May 10, 1974); *Newman v. Mary*, (T.R.O.) Civ. No. 74-934, Section I, (E.D.La. Apr. 24, 1974); *Godfrey v. Stanton*, Civ. No. 72-F-77 (N.D. Ind. June 8, 1973); as well as the two opinions in the instant case. In two other cases regulations were withdrawn upon the filing of the complaints. *Doe v. Kurtis*, 306 F. Supp. 509 (S.D. N.Y. 1969); *Magness v. Davidson*, Civ. 71-1263-HM (D.Md. 1972).

submitted that the affirmances in the three NOLEO cases were proper given the merits of the cases and that those cases should be afforded a high level of precidental value. Unlike the case of *Jordan v. Edelman*[9] in which the Court assigned a low value to the previous affirmances which had dealt obliquely with the Eleventh Amendment argument, the instant case is fully on point with the major issue decided in *Meyers, Taylor* and *Weaver*. The question on the merits of each of these four cases is the validity of NOLEO conditions of eligibility. That question was met four-square each time the Court reaffirmed one of these cases; it was not a peripheral issue which might have been given less than full attention. Nor were these cases decided on a constitutional basis. In each case the Court chose to decide the matters on statutory grounds notwithstanding the existence of substantial constitutional claims within each case. Legislative action is entirely possible within the area. Thus under Mr. Justice Brandeis' teaching in *Burnet*, there is a good reason to follow the three affirmances.[10] Not only is the law settled, it is settled right. The decisions should be afforded the weight of decisions on the merits and the instant case should accordingly be affirmed.[11]

In *Carleson v. Remillard* the Court unanimously reaffirmed the *Townsend* doctrine:

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[9]*Jordan v. Edelman*, ___ U.S. ___, 94 S.Ct. 1347 (1974).

[10]*Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-408, 52 S.Ct. 443, 447 (1932) dissenting opinion.

[11]See *Serrano v. Priest*, 96 Cal. Rptr. 601, 624 (1971); Note, Summary Dispositions of Supreme Court Appeals, 52 Boston University Law Review 373, 412 (1972).

> In Townsend, we also expressly disapproved the HEW policy which permitted States to vary eligibility requirements from the federal standards without express or clearly implied congressional authorization. *Carleson v. Remillard*, 406 U.S. 598, 601 92 S.Ct. 1932, 1934 (1972).

Appellants allege that the *Dublino* case has modified this cornerstone of welfare law.[12] In fact, *Dublino* reasserts the validity of the *Townsend* doctine. Where State law excludes people from AFDC benefits whom the Social Security Act provided would be eligible and where there is no room in the Act's language or legislative history to warrant the State's additional eligibility requirements then the eligibility requirement fails. That of course was not the case in *Dublino* since the 1967 Amendments to the Social Security Act specifically set forth conditions of eligibility as part of the Work Incentive Program. It is however the situation presented by the instant case. As Appellant Lavine's brief in this Court admits at page 42, the express provisions of 42 U.S.C. §602(a)(11) "appear to preclude denial of assistance to the child." Of course denying the caretaker is the same as denying the child. If any requirement for violation of a specific clause of the Social Security Act exists as a result of *Dublino* it is met by section 602(a)11 and 17.

Appellants reading of *Dublino* is dangerously overboard. They, and the administrators of the Social and Rehabilitation Service in HEW, would like to believe that *Dublino* allows States to set up *any* conditions of eligibility they may desire as long as it contributes to

[12] *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507 (1973).

"efficiency of administration" and does not violate an express provision of the Social Security Act.[13] This is in fact the converse of the *Townsend* doctrine which is that need and dependency are the only conditions of eligibility for AFDC except those standards which appear expressly in the Social Security Act or its legislative history.

The objective of efficiency of administration cannot be allowed to bloat so large as to obscure the fundamental purpose of the Act. Denying otherwise eligible families in the interest of greater efficiency of administration defeats the Congressional purpose of aiding needy families. *Dublino* cannot stand for the usurpation of Congressional program and power to shortsighted bureaucratic interests. The Secretary in his regulation has misdiagnosed the effect of *Dublino* on the *Townsend* doctrine. *Dublino* does not stand for the proposition that States may set any condition for eligibility they desire. In fact, the Court in *Dublino* said simply that the New York Work Rules were not preempted by the WIN Program, and the question of whether individual rules conflicted with the Social Security Act was remanded to the court below. This Court specifically refused to do what the secretary asserts it did.

Wyman v. James, 400 U.S. 309, 91 S.Ct. 381 (1971) and *Snell v. Wyman*, 393 U.S. 323, 89 S.Ct. 553 (1969) continue to be distinguishable as cases dealing with eligibility requirements outside the NOLEO sphere. Both cases were decided before *Townsend v. Swank* and

[13]See 39 Fed. Reg. May 8, 1974, 16362. Final regulation appears at 39 Fed. Reg. July 24, 1974, 26912.

the NOLEO affirmances. Consideration of the earlier cases failed to preclude the *Townsend* doctrine or the NOLEO results. *Wyman v. James* was a constitutional determination that the Fourth Amendment did not forbid home visits by welfare workers to recipients' residences. *Snell v. Wyman* dealt with available resources, not the counting of contingent or possible resources in determining eligibility. Appellant Lavine would have us believe that he is required to count possible future support payments as present resources in the determination of eligibility. However, 42 U.S.C. §602(a)(7) allows consideration of recipients income and resources and the income and resources of other individuals *living in the home* of the recipient only. By definition this does not include non-supporting, deserting or abandoning parents. Additionally, resources, in order to be considered, must be actually and presently available to the applicant for assistance. 45 C.F.R. §233.20(a)(3)(ii); Handbook of Public Assistance Administration §3120 and 3124; 18 N.Y.C.R.R. §352.16, 352.23 and 351.37. Where location of an absent parent, pursuit, prosecution, and enforcement of court orders all stand between the child and the actual receipt of the support payment, such potential monies cannot be considered presently available. Counting such support payments in determining eligibility is considerably different from the taking of liens on real property and personal injury recoveries or the taking assignments of insurance proceeds countenanced by *Snell*.

The *Townsend* doctrine remains the law. *Wyman v. James* and *Snell v. Wyman* do not change the illegality of a NOLEO condition of eligibility any more than *Dublino* does.

II.

THE CLAIM THAT NEW YORK SOCIAL SERVICES LAW 101-a PENALIZES ONLY THE CARETAKER AND NOT THE CHILDREN IS "UNREALISTIC" AND DOES NOT REMEDY THE ILLEGAL CONDITION OF ELIGIBILITY

New York has attempted to salvage its illegal NOLEO condition of eligibility by claiming that the statute only operates to deprive the caretaker of assistance and not the children. Judge Port speaking for the three-judge court below termed the distinction "unrealistic". *Shirley v. Lavine*, 365 F. Supp. 818, 822 (1973). The web of legislative history woven in Appellant Lavine's brief in an attempt to convince the Court that Congress intended not to benefit the caretaker but only the children is gossamer.

At its inception the Social Security Act did not provide for the needs of the caretaker; allowances existed for the children only. As early as 1941 the Social Security Board, the predecessor of the Department of Health, Education and Welfare, recognized that an individual child's needs might "under certain circumstances . . . comprehend requirements that also serve the welfare of other individuals in the household." Payments were made for "common household expenses if the maintenance of such household was necessary to the welfare of the recipient." Social Security Board RFL 331, Item 197 (Aug. 9, 1941).

The 1950 Amendments to the Social Security Act, the very amendments which created the NOLEO program, expanded the Aid to Dependent Children

Program to include caretaker relatives. 42 USC §606(b)(1). The proposal was made by the Administration. The Commissioner of Social Security, Arthur Altmeyer, stated to the House Ways and Means Committee that the goal of the ADC program should be "to provide adequately not only for the children but also for the parents or other relatives caring for the children and for the expense of maintaining the home." House Committee on Ways and Means, Hearings on H.R. 2892 and H.R. 2893, 81st Cong., 1st. Sess. 14 (1949). Other witnesses testified that the caretaker grants were necessary because in situations where other funds were not available to the caretaker he or she is forced to share in the meager payments made to the child. The situation is made even more difficult by the fact that caring for the child itself prevents the caretaker from working. *Id.* at 399.

In reporting out the bill both the Majority and Minority supported the granting of aid to the caretaker. The Majority Report explained the rationale:

> In the present law aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly in families with small children, it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing and other essentials, amounts allotted to the children must be used in part for this purpose or no other provision is made to meet her needs . . . To correct the present anomalous situation wherein no provision is made for the adult relative and to enable States to make payments that are more

nearly adequate, the bill would include the relative with whom the dependent child is living as a recipient for Federal matching purposes. H.R. Rep. No. 1300, 81st Cong. 1st Sess., 45 et. seq. (1949); U.S. Serial 6-11301.

The Minority Report echoed this concern:

> We also favor extending Federal Participation to the adult 'caretaker' of a dependent child as provided for in the bill. This will result in better care for the child and in the more equitable apportionment of Federal funds among these depending groups." *Id.* at 170.

Representative Forand supported the provision on the floor of the House:

> [T]he relative caring for the children must have food, clothing and other essentials, [and the assistance presently] allotted to the children under present law must be used in part for this purpose if such relative does not have any income or is not provided aid from some other source. 95 Cong. Rec. 13932 (1949).

While the Senate Finance Committee sought to delete the provision as a means of cutting welfare spending the full Senate refused and adopted an amendment extending assistance to caretakers. 96 Cong. Rec. 8485 (1950). The policies behind this extension were stated clearly by Senator Lehman of New York:

> This proposal is a simple matter of humanity, common sense and justice. It is obviously neither humane nor sensible to make provision for children who are needy because of the death, disability or desertion of the family breadwinner and fail to make provision for the mother of such children. This is particularly true in view of the pitiful inadequacy of the Federal funds now made available for such children. 96 Cong. Rec. 8794 (1950).

Plainly then the 81st Congress recognized the necessity of providing for the needy caretaker as well as the dependent children in the ADC program. With a historical record of this clarity it is to be expected that if the same Congress had wished the NOLEO provisions to be used as a condition of eligibility for the caretaker, but not the children, it would have said so explicitly. Of course the 81st Congress said nothing at all about an NOLEO eligibility condition. The silence exists because the NOLEO scheme required notice to law enforcement officials and not forced prosecutions and coerced cooperation from the caretaker. Congress never intended the NOLEO provision to be treated as conditions of eligibility. The Congressional purpose was to strengthen family life not to destroy the emotional bond of the family by requiring one family member to appear against another family member as an adversary in a courtroom.

The Congressional purpose has remained constant through the years. In 1962 Congress officially changed the name of the program to "Aid to *Families* with Dependent Children" Pub. L. 870543 (July 25, 1962); 42 USC §601 (emphasis supplied). As Justice Stewart noted in *Dandridge v. Williams*, this change and the other references to families added in 1962:

> show that Congress wished to help children through the family structure. The operation of the statute itself has this effect. From its inception the Act has defined 'dependent child' in part by reference to the relatives with whom the child lives. When a 'dependent child' is living with relatives, the 'aid'

> also includes payments and medical aid to those relatives . . . The States must respond to this federal statutory concern for preserving children in a family environment. 397 U.S. 479 et seq.

In 1967 when Congress was creating additional eligibility requirements in the Work Incentive Program it held fast to its aim of strengthening family life. New NOLEO related provisions were added (42 USC §602(a) 17, 18, 21, 22) but none were specified to be conditions of eligibility as the work rules were (42 USC §602(a)(19)(F)).

The Congressional intent remains the same today. Bills have been proposed from time to time that would impose a condition of eligibility in the NOLEO procedures. None have passed both Houses. See H.R. 3153 §151(c)(3)(5) passed by Senate 93d Cong., 1st Sess. (1973).

New York seeks the sanction of this Court for the distinction between terminating aid to caretakers of ADC families and terminating aid to children of those families. The distinction has been recognized as a chimera since the beginning of the NOLEO litigation . In *Doe v. Harder* (supra) the Connecticut State Welfare Commissioner was held in contempt of the *Doe v. Shapiro* decision for attempting such a ruse. Judge Mansfield declared the distinction an illusion when the instant case was first argued:

> We also feel that the distinction based upon the fact that here the aid would be denied to a mother instead of directly to the child is an illusory one. The program being administered here, by its very title is 'Aid to families to dependent children.'

> And Section 401 of the Social Security Act, that is 42 U.S.C. 601, refers repeatedly to the motivation which is to furnish financial assistance to dependent children and the parents or relatives with whom they are living. Particularly as a practical matter, and I think counsel all did concede this, that the denial of the relief, would visit just as much harm and hardship upon the child because it would be unrealistic not to appreciate that the mother would then be forced to turn to the portion allocated to the child in order to support the family unit. *Shirley v. Lavine* oral opinion June 7, 1972, p. 12

The New York Statute is simply the same old condition of eligibility dressed up in new clothes, a condition which has uniformly been held by this Court and courts across the nation to be at variance with the Social Security Act. The legislative history demonstrates that Congress did not intend the NOLEO provisions to be used as conditions of eligibility. The fact that the condition is applied to the caretaker instead of the children does not avoid that vice. New York Social Services Law §101-a conflicts with the Social Security Act and is therefore void and unenforcible.

III.

BECAUSE CONGRESS NEVER INTENDED THE NOLEO PROVISIONS TO BE CONDITIONS OF ELIGIBILITY THE AMENDMENT 45 CFR §233.90 IS NOT A GUIDEPOST TO BE FOLLOWED JUDICALLY

Prior to 1950 there was no NOLEO provision within the Aid to Dependent Children title of the Social

Security Act. In the 1950 amendments to the Social Security Act, Congress added sections providing for ADC allowances to include payments for the caretaker's needs, for applications to be acted on with reasonable promptness, for fair hearings for aggrieved applicants and recipients, and for notice to law enforcement officials of the furnishing of ADC to families in which a child has been deserted or abandoned. 42 USC §606(b)(1), 602(a)(10), 602(a)(4), 602(a)(11).

The NOLEO mechanism was strictly limited. The House and Senate Reports described what it was:

> Section 321(b) of the bill amends Section 402(a) of the Social Security Act by the addition of a new clause (10) effective July 1, 1952 which would require an approved State plan for aid to dependent children to provide for prompt notice to appropriate law enforcement officials in any case in which aid to dependent children is furnished to a child who has been deserted or abandoned by a parent.
>
> The bill is the same in this respect as the House bill except for the change in the effective date necessitated by the passage of time. S. Rep. No. 1669, 82d Cong., 2d Sess. 172 (1950); U.S. Serial 11368.[14]

At no point in the legislative history of this amendment is there any discussion of cutting off the caretaker relative for not complying with the requirement. In fact, there was nothing the recipient had to do under the amendment. The only action mandated was for the State Welfare Department to turn over to the

[14]The House Report tracks the language of the Senate Report with the exception of the last paragraph. H.R. Rep. No. 1300, 82d Cong., 1st Sess. 38 (1949); U.S. Serial 6-11301.

Law Enforcement Officials a list of those who were receiving ADC and who had an absent or deserting parent. Indeed, in a spirit of concern for the recipient's dignity and emotional stability, the recipient was to be informed of the requirement of referring so that the recipient herself could then decide if she wished to continue to receive public assistance under such circumstances. Handbook of Public Assistance Administration Part IV, §8120 para. 5 (1951) and see §8146.[15]

The administrative reading of Congress's intent not to make the NOLEO provision a condition of eligibility is made very plain in the Handbook section on eligibility:

> The amendment does not make the assistance agency responsible for filing a complaint or initiating or pressing a suit against a deserting parent. (The scheme is for the law enforcement officials to do that.) Neither does it make the agency responsible for requiring the applicant to take action against the deserting parent *or for making eligibility for assistance conditional upon action by the applicant.* Handbook §8120. (emphasis supplied).

The Handbook goes on to reinforce the point:

> Congressional action was clear with regard to the difference between public assistance administration and law enforcement, and did not place upon the public assistance agencies responsibility for enforcing support. The public assistance job is seen as that of providing eligible children with the assistance they need; *and it is not the intent of the*

[15]The Handbook of Public Assistance Administration continues to be valid unless it is directly superseded by contrary provisions of the Code of Federal Regulations. Its value in helping to interpret Congressional intent continues undiminished.

> *legislation to deprive needy children of assistance in order to punish their parents for neglect of their duties.* Although accepting assistance involves notice to the law enforcement officials if a parent has deserted or abandoned his child, *the amendment does not impose an additional eligibility requirement.* This is clear in the wording of the provision which requires notice that aid has been furnished 'in respect of a child who has been deserted or abandoned by a parent'. *Ibid.* (emphasis supplied)[16]

According to the Handbook, Congress's thinking in this area was non-punative and non-coercive.[17] Congress recognized that a parent deserted by her spouse and left to fend alone for herself and her infant children was in a delicate and stressful situation. Thus the Handbook urges social work rather than coercion:

> The financial obligations of parents are necessarily discussed in connection with eligibility. Actual and potential resources will have been reviewed with the parent caring for deserted or abandoned children (and, if possible, with both parents) and tentative agreements reached for utilizing existing resources and further developing potential resources. *The fact that assistance is available to the family during the period in which the parents are*

[16]See Codification at 45 CFR §235.70.

[17]It is axiomatic that the construction of the act by those charged with administering it is entitled to great weight, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), especially when such construction was contemporaneous with the statute, *Norwegian Nitrogen Products v. United States*, 288 U.S. 294 (1933), and has been applied over a long period of time. *United States v. Shreveport Grain and Elevator*, 287 U.S. 77 (1932).

> *being helped to work out more permanent plans enhances the opportunity for sound planning and for maintaining for the children some degree of stability and security. Id.* at §8146 (emphasis supplied).[18]

The aim of the NOLEO program was to bolster the family unit while seeking to encourage the absent parent to undertake his responsibilities to his family. The law enforcement officials were to be made specifically aware of this goal. *Id.* at §8141. The fact that deserted parents might have a reluctance to bring charges against a family member was recognized and agencies were instructed to provide training to that the workers might understand the emotional factors in family breakdown and reconciliation and to act in a supportive role in such times of stress. *Id.* at §8148. Not only did the NOLEO amendment itself not present a condition of eligibility, but the Handbook, in construing the intent of Congress, specifically advised States against promulgating legislation which would conflict with the purposes of the ADC program.

[18] Of course the NOLEO requirements as interpreted do not change the primary obligation of parents to support their children. However, the AFDC program is a recognition of the fact that dependent children are not always supported by their parents. As the Handbook indicates, it is when the primary obligation is not being met that the AFDC program becomes available to help a family out of its destitution. Notice to Law Enforcement Officials is simply one way of attempting to see that the primary obligation is enforced, it certainly is not an attempt to subvert that obligation, rather it is a recognition that families need money and social services to survive when the parent deserts his family and until he becomes able or willing to fulfill his obligation of support.

> In most instances, States should be able, without changes in State laws, to carry out this requirement of the Federal act by issuing the necessary rules and regulations. The Bureau advises against legislation that makes the actual commencement of action on the part of a parent to obtain support from the parent who had deserted or abandoned his children a condition of eligibility. Such provisions deprive needy children, who would otherwise be eligible, of the right to receive aid to dependent children pending the commencement of action to obtain support from the absent parent. *Id.* at §8149.

The Congressional emphasis on providing social work and constructive rehabilitative services to help people off the welfare rolls continued in the next set of amendments to the Social Security Act in 1962.[19]

[19]The Senate Report demonstrated the continued commitment:

> A. IMPROVEMENT IN SERVICES TO REDUCE OR PREVENT DEPENDENCY
>
> The Committee bill is designed to improve the rehabilitative aspects of the public assistance programs particularly in stimulating constructive services designed to help families and individuals to attain self-sufficiency. The committee is convinced that much can be done to relieve the undesirable effect on the community of a large and growing number of persons now on assistance. The number of illegitimate births has been increasing and indications are that family break-up by reason of desertion, divorce, and separation have also increased significantly in the population as a whole, as well as among public welfare recipients. Experience has shown that services by highly trained welfare personnel can help these situations. These social services, usually provided by trained social workers, or workers employed under the direction of social workers are designed to help families and individuals to become self-supporting rather than dependent upon welfare checks. S. Rep. No. 1589 81st Cong., 2d Sess. p.7 (1962) 1962 United States Code Congressional Administrative News 1943 at 1949.

There was no provision made in these amendments which would have required a change in the approach to the NOLEO area set forth in the Handbook. Indeed, the legislative history reflects no discussion of any such change.

In 1967 Congress again spoke to the problem of pursuing support from the deserting parents of dependent children. In the Amendments to the Social Security Act of 1967, Congress sought to strengthen the existing NOLEO procedure. But it did not provide for a NOLEO related condition of eligibility. A summary of goals of the amendments and the changes in the AFDC program required to effectuate them, is set forth in the House Report:

> To bring unsuitable home conditions of children to the attention of the courts or law enforcement agencies; to develop a program through a single organizational unit to establish paternity of illegitimate needy children (in order to get support payments from the fathers); to utilize reciprocal support arrangements with other states to enforce court support orders for deserted children; and to enter into cooperative arrangements with the court to carry out these arrangements. H.R. Rep. No. 544, 90th Cong. 1st Sess., 4 (1967).

The amendments provided that the Department of Health, Education and Welfare and the Social Security Administration therein were to provide courts with addresses of deserting or abandoning parents. *Id.* at 10. The Senate had proposed a scheme in which support payments would be considered a debt to the United States and would be collected by the U.S. Treasury by utilizing the Internal Revenue Service's extensive bank of information on taxpayers as well as its ability to

impose priority liens. S. Rep. No. 744, 90th Cong., 1st Sess. 160 et. seq. (1967); U.S. Serial 12752-2.[20] Thus two new information gathering devices were to be made available: Social Security records and the taxpayers records of the I.R.S. These systems were to feed into the single state unit which was to coordinate the work with the law enforcement officials and the courts. At no point in the legislative history is there mention of a new information gathering device of conditioning eligibility upon the caretakers cooperation in the prosecution of the absent parent. See House Report 544 *op. cit.*, Analysis Section by Section at 172.

Immediately after passage of the Amendments, Senator Mansfield congratulated the Congress on continuing to seek to strengthen family life through the provision of social services by agency social workers. The non-coercive approach which had existed in the 1950 and 1962 amendments was reaffirmed. 113 Cong. Rec. 36925 (1967). Senator Mansfield pointed out that the bill required the use of the "existing legal machinery to locate the absconding individual and hold him accountable for the money he should pay for the support of his children." *Ibid.*

The "existing legal machinery" did not include the device of coerced cooperation as a condition of eligibility. There can be no doubt that the 90th Congress knew what a condition of eligibility was and that it knew how to create such a condition in the AFDC program. The 1967 amendments set up a new Work Incentive Program which required certain recipients of AFDC to work as a condition of eligibility for

[20]See Congressman Mills' remarks, 113 Cong. Rec. 36368 (1967).

public assistance. Failure by the recipient to follow the rules of the Work Incentive Program was grounds for termination of public assistance. 42 U.S.C. §602(a)(19). See *New York Department of Social Services v. Dublino*, 412 U.S. 405 (1973). Indeed Senator Long, the floor manager of the 1967 amendments, discussed making the work requirements conditions of eligibility. 113 Cong. Rec. 32592 et seq., (1967). But in his discussion of the NOLEO related amendments he specifically indicated, under questioning from Senator Kennedy of New York, that the establishment of paternity was not a condition of rendering Aid to the Families of Dependent Children. 113 Cong. Rec. 33540 (1967). Senator Long reiterated that the approach to non-support was the same non-coercive Notice to Law Enforcement Officials. "It is a purpose of the provision of our bill just as it was the purpose of the provision in the House bill, that the State agency should seek to obtain support from a father who has abandoned his children and left them on welfare." *Ibid.* No new condition of eligibility was created, instead Long pointed out that emphasis continued to be on providing the caretaker with services so she could overcome her dependency:

> We said we will do the best we can. We will offer training to these mothers. We will give them lawyers to help them go to court and get alimony from their husbands. We will provide subsidized employment. We will make contracts with the hospitals and universities to help them clean up the slums or grounds. 113 Cong. Rec. 33541 et. seq. (1967).

Senator Long said the amendments would give caretakers lawyers to *help* them go to court. He did

not say that the bill required mothers to go to court upon pain of losing their public assistance.

There have been no additions to the Social Security Act in the NOLEO area since 1967. This then is the legislative history: A history of supplying services and social work to a caretaker faced with the emotional trauma of desertion and the destitution of abandonment. A history of seeking to strengthen family life by recognizing the reluctance of a caretaker to bring suit against a family member. A history of referring the pursuit of support payments to governmental units with special resources designed to trace abandoning parents and enforce support obligations. It is on this basis that suddenly, without any further expression of Congressional intent, HEW on May 3, 1973, on the request of Appellant Lavine, reversed itself and promulgated 45 CFR §233.90 allowing the use of the NOLEO requirement as a condition of eligibility for the caretaker relative. Plainly the three judge court below was correct when it concluded:

> [The] unbroken line of court decisions construing these provisions and the absence of any Congressional corrective action persuade us that the agency's new interpretation is in error and not a guidepost to be followed judically. *Shirley v. Lavine*, 365 F. Supp. 818, 825 (1973).

CONCLUSION

The decision of the three-judge court below should be affirmed and New York Social Services Law §101-a should be declared void and unenforceable as presenting a condition of eligibility not set forth in the Social Security Act.

Respectfully submitted,

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